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NO. 02-241

In the Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, JEFFREY LEHMAN,
DENNIS SHIELDS AND THE Board of Regents
Of the University of Michigan, et al.,
Respondents,
and
KIMBERLY JAMES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE*, THE NEW MEXICO HISPANIC BAR ASSOCIATION, THE NEW MEXICO BLACK LAWYERS ASSOCIATION, AND THE NEW MEXICO INDIAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are three organizations[2] together representing over five hundred New Mexico attorneys, most of whom self identify as Hispanic, African American or Native American.[3] Most members of these three

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[1] This brief is filed with the consent of the parties. Blanket consents for filing of briefs *amicus curiae* were filed by the parties on December 20, 23, and 30, 2002. Only the following entities have donated funds for the preparation, printing and service fees for this brief: the New Mexico Hispanic Bar Association, the New Mexico Black Lawyers Association and the New Mexico Indian Bar and the Indian Law Section of the New Mexico Bar Association. No counsel for any party has authored this brief in whole or in part.

[2] The New Mexico Hispanic Bar Association, formed more than twenty-five years ago, is a voluntary bar association which represents and promotes the professional interests of more than four hundred twenty Hispanic members of the New Mexico bench and bar. The stated purposes of the organization "include, but are not limited to, acting to promote the education and development of Hispanic legal professionals in the State of New Mexico and acting to develop and promote full participation of Hispanics within the legal profession, as well as working to enlarge the talent pool of highly qualified people interested in state and federal leadership positions." http://www.nmbar.org/HBA/hbaaoubtaba.htm (2/6/2003).

The New Mexico Black Lawyers Association, formed in 1982, is a voluntary bar association of twenty-nine members. The stated purposes of the organization are, *inter alia*, "to conduct a program of continuing legal education for the membership, ...to advance the science of jurisprudence, improve the administration of justice,...and to protect civil and political rights of the citizens and the residents of the several states of the United States." Articles of Incorporation, filed 3/25/82.

The New Mexico Indian Bar Association is a voluntary bar association, formed in 1985, consisting of approximately sixty members. The stated purposes of the organization are, *inter alia*, "to study the needs of the Pueblos, Tribes, State and national community for legislation, and to present recommendations to the Congress, Pueblos, Tribes and State Legislature in the public interest, to protect the civil rights of the citizens of the community through the legal profession...to protect civil and political rights of the citizens and residents of the Pueblos, Tribes and Several States of the United States." Articles of Incorporation, filed 1985.

[3] This brief has used the racial/ethnic designation of "Hispanic," African American," and "Native American," in place of others currently in use in public discourse. They are chosen to simplify the analysis herein. The terms "of color" and "minority" are used interchangeably even though in New Mexico no one racial group constitutes a majority group.

organizations have been beneficiaries of the various public policies that are called affirmative action; none more important than this Court's decision in *Bakke* permitting institutions of higher education to consider race as one criterion for purposes of student admissions.[4]

Amici contend that, as a proximate result of these race-conscious admission policies, New Mexico's legal system has been profoundly improved by the dramatic increase in lawyers with the predisposition and the training to provide services to the Hispanic, Native American and African American populations that comprise the majority of citizens in this state. Such policies opened the doors of educational opportunity for many members of the *amici* organizations. Through dint of hard work, family sacrifice and community support, these individuals, who formerly would not even have applied to law school, did apply, were accepted and completed their law degrees, some earning academic distinction. They passed the bar examination and opened or joined law offices throughout the state to provide competent legal services to the citizenry of New Mexico.

Today many members of the *amici* organizations have risen to positions of leadership in the justice systems of the federal government, the state of New Mexico and tribal governments. Many serve the state as judges, legislators, heads of executive agencies, law professors, and tribal officials. Many render legal services to underserved communities and most participate in varied civic activities. Having experienced the life-enhancing effects of affirmative action policies, *amici* are committed to preserving these gains for the generations that follow. Consequently, the position of the *amici* is that the consideration of race in student admission by colleges, universities and professional schools is constitutional and indispensable to the provision of competent legal services in states such as New Mexico with large populations of racially and ethnically distinct peoples.

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[4] *Regents of the Univ. of CA v. Bakke*, 438 U.S. 265 (1978).

ARGUMENT
INTRODUCTION AND SUMMARY

Invalidating the use of race-sensitive admissions procedures would adversely affect the State of New Mexico's compelling and constitutionally valid interest in assuring competent legal services for underserved populations. The consideration of race by the state in any arena triggers strict scrutiny; nonetheless, if such a policy or practice is proven to serve a compelling state interest and is narrowly tailored, it will survive constitutional review. [5] The Court has identified two principal concerns that frame the narrow tailoring analysis: first, there must be sufficient evidence that race neutral alternatives would not advance the state's compelling interest [6] and second, that the affirmative action plans in question have "no logical stopping point."[7]

Amici agree that taking race into account as one factor in the evaluation of students for admission to study in institutions of higher education with the purpose of creating a diverse learning environment is a compelling state interest.[8] The *amici* here, however, speak to another equally important interest. A racially diverse state bar depends on a racially diverse law school and both are necessary for a minority-majority state like New Mexico to meet its obligation to provide legal services to racially isolated and economically disadvantaged state residents.

Justice Powell accepted the University of California at Davis Medical School's stated purpose of "improving the delivery of health-care services to communities currently

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[5] *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).
[6] *City of Richmond v. Croson*, 488 U.S. 469, 507 (1989).
[7] *Wygant et al. v. Jackson Bd. of Ed. et al.*, 476 U.S. 267, 275 (1986).
[8] *Bakke*, 438 U.S. at 317. Respondents and other *amici* writing in support of Respondents will make the arguments for that proposition as well as the corollary argument that these admission procedures can be narrowly tailored. In order to comply with this Court's requirement that *amici* not duplicate other arguments, those arguments will not be addressed at length in this brief.

underserved."[9] Justice Powell concluded, however, that the University had failed to "[show] that its preferential classification is likely to have any significant effect on the problem" of promoting better health-care delivery to deprived citizens.[10] Thus, Justice Powell's concern was evidentiary not constitutional.

Such racial diversity in the state bar is critical to ensure that all lawyers adequately understand the multiplicity of issues that arise at the intersection of law and race. New Mexico faces unusual challenges in the provision of legal services because of the rapid growth in its populations of color and the interconnected problems caused by extensive poverty in its principal cities, its rural areas and, most dramatically, in the Indian pueblos and nations. Moreover, the Indian pueblos and the Navajo and Apache nations have recently experienced rapid development in their tribal court systems as they act to exercise and protect their sovereignty, further challenging the state to provide trained professionals from all racial backgrounds to practice before their tribunals.[11]

The University of New Mexico Law School's admissions process has directly transformed the racial composition of the New Mexico State Bar; accordingly, the bar is better able to provide legal assistance to the state's underserved communities.[12] Three decades of experience among the legal institutions of the state have demonstrated that only race-conscious admissions procedures will admit sufficient numbers of students of color to ensure that the complex needs of the state will be met. The UNM Law School has

[9] *Bakke*, 438 U.S. at 310.

[10] *Bakke*, 438 U.S. at 311.

[11] *See* Gloria Valencia-Weber, *Law School Training of American Indians as Legal-Warriors*, 20 AMER. IND. L REV. 5 (1996) (advocating for the training of more Native American attorneys and for changes in law school environments and curricula to train them for their contemporary roles within tribal governments).

[12] *See, The Status of Minority Attorneys in New Mexico, an Update, 1990-1999, The State Bar of New Mexico Task Force on Minorities in the Legal Profession II* at 24-25 (2000) *("State Bar Report")*.

focused on student admissions to address the problem of scarce legal resources for underserved populations. As importantly, it has also implemented a program of study with a clinical requirement designed to prepare graduates to respond to the needs of all clients, including those that have been historically underrepresented.

These clinical programs, which predominantly serve low-income racial minority clients, cannot thrive without significant numbers of students of color. Increasing service to disadvantaged communities is, therefore, a compelling justification for the limited use of race-sensitive considerations in student admissions because a racially diverse state bar is an essential component of the state's justice systems. Justice Powell's *Bakke* opinion indicated that a state's interest in serving underserved communities would be compelling enough to warrant the use of race-sensitive admissions if the state could show that empirical data demonstrated such considerations were necessary in order to provide services to underserved communities.[13]

[13] *Bakke*, 438 U.S. at 311.

ARGUMENT

I. AS A MINORITY-MAJORITY STATE WITH EXTENSIVE POVERTY AND MULTIPLE INDIAN JURISDICTIONS, NEW MEXICO FACES SPECIAL CHALLENGES IN THE DELIVERY OF LEGAL SERVICES TO ALL ITS CITIZENS.

New Mexico is unique in many ways. Perhaps most salient is the fact that it is one of three "minority-majority" states in the union,[14] wherein the number of non-white residents exceeds the number of white and where no one racial group is greater than 50% of the state's population. [15] Based on the 2000 Census, New Mexico's total population numbers 1,819,046 people; 55.3% of these are non-white persons, a percentage greatly exceeding the national figure of 30.9%. [16] What is further distinctive about New Mexico is that of the 55.3% minority persons, 42.1% are Hispanic as compared with 12.5%, the national total while only 1.7% are African American compared with 12.1%, nationally.[17] Arguably its most remarkable attribute, however, is that American Indians represent 8.9% of our total population in marked contrast to the national total of 0.7%. [18]

New Mexico is also the poorest state in the nation, ranking second only to the District of Columbia, for the percentage of residents falling below the poverty level.[19] In 1997, 19.3% of New Mexico's population fell below the poverty line. New Mexico also has the third highest

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[14] Hawai'i and California are the other two.
http://www.edd.state.nm.us/FACTBOOK/pdf/demogr.pdf (2/13/03).
[15] U.S. Census, http://quickfacts.census.gov/qfd/states/ 35000.html (1/3/03).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *See* U.S. Census, Small Area Income and Poverty Estimates Program (revised March 2001).

unemployment rate in the country,[20] correspondingly high rates of violence,[21] and profound health care deficits.[22] These factors reflect the weak economic status of communities in the state. In New Mexico, programs embracing affirmative action principles are not only constitutionally sound but necessary responses to devastating socioeconomic conditions that would escalate in their absence.

A. N. M. Communities Of Color Face Significant Obstacles In Gaining Access To Legal Services.

New Mexican communities are significantly segregated along racial lines. One study from Albany University

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[20] U.S. Dept. of Labor, Bureau of Labor Statistics (June 2001). The most current information can be found at www. dol.state.nm.us/dol_surr.html (January 3, 2003). New Mexico's Labor Force Participation Rate from 1999 ranked the state 49th in the union at 62.0%. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, Geographic Profiles (1999). The "Employment to Population" ratio that same year was 58.5%, ranking New Mexico, again, 49th in the union. *Id.* In 2000, our per capita personal income level was $22,203, yet again, ranking New Mexico 49th out of 51 jurisdictions, including the District of Columbia. *See* U.S. Dept. of Commerce, Bureau of Economic Analysis, Survey of Current Businesses (May 2001).
[21] In 1999, New Mexico was ranked 2nd for incidences of murder, 3rd for rape, 2nd for assault and 2nd for burglary. *See* http://www.morganquitno.com/cit03pop.htm. That same year, Albuquerque, New Mexico's largest city, was ranked 8th out of the 25 most dangerous metropolitan areas in the union. *Id.* In 2000, Albuquerque was home to 40.5% of New Mexico's total population. U.S. Census Bureau (2000).
[22] New Mexico's 2002 State Health Ranking is 42nd in the nation, unchanged from 2001, reflecting "a high number of children in poverty at 25.6% of persons under age 18." *See* United Health Foundation: State Health Ranking 2002 "State by State Snapshots." Furthermore, in New Mexico 44% of pregnant women are in need of medical attention, the state has an uninsured population of 20.7%, and a climate where the "support of public health is 45% below the national average." *Id.* This report also shows that there is a notable disparity for prenatal care among races, "for example, 44.7% of pregnant American Indian women receive adequate prenatal care compared to 57.7% of pregnant white women." *Id.* This discrepancy has particularly dramatic significance in the State of New Mexico where a great number of female American Indian resides.

concludes that this segregation reflects racial distinctions and not merely socioeconomic standing.[23] New Mexico is racially segregated at the county level[24] and within Albuquerque, the city in which 40% of its citizens reside.[25] Higher incidences of racial segregation reflect alarming disparities in community poverty levels.

There is also a marked correlation between these segregation/poverty statistics and levels of depressed educational attainment.[26] Studies like the Mumford Report[27]

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[23] *See Income Differences and Residential Segregation,* ("Mumford Report"), http://mumford1.dyndns.org/cen2000/segregation /SegIncNatPages/2005egInc.htm (1/29/03).

[24] *See U.S.Census Bureau* (2000). For instance, Catron County, which is 75.8% White shows a poverty level of 23.9% while McKinley County only sixty miles away is 73.2% Native American with a poverty level of 37.4%. *See Mumford Report.* Los Alamos County, which is 82.1% White, has a poverty level of 2.5% while San Miguel County, again only sixty miles away, has a Hispanic population of 78% and a poverty level of 26.7% or eleven times greater than that of Whites. *Id.* This racial concentration and economic disparity is true in New Mexico's southern counties as well. Lincoln county is comprised of 70.9% Whites and 25.6% Hispanics while the adjoining Guadalupe county has merely 15.5% White and 81.2% Hispanic residents. The poverty level in Lincoln County is 18.3%, but Guadalupe County has a rate of 29.7%. *Id.* This 11.4% discrepancy is significant when considering that the national average poverty level itself is only 11.7%. *Id.* While New Mexico has a small African American population, it is highly segregated and suffers from high poverty, lack of adequate housing and poor educational outcomes. *See, e.g., Access to Housing Opportunity: Analysis by Consensus and the Home Seekers' Experience,* Report prepared for the City of Albuquerque by the Legal Aid Society of Albuquerque, October, 1996.

[25] *Id.* By comparing Whites with minority groups in Albuquerque, home to forty percent of the state's residents, in three income levels (affluent, mid-income and poor), the researchers determined that the segregation levels remained consistent across economic lines. As the study explained, "[i]f racial segregation were mainly a reflection of class segregation, the levels would be much lower when we compare affluent whites to affluent minorities, or poor whites to poor minorities." *Id.* In fact, the levels are not lower.

[26] *Id.* The average high school drop out rate in Guadalupe County is almost double that of the adjoining Lincoln County; the rate in McKinley County is fully three times greater than that for Catron County; and the average drop out rate in San Miguel County is nearly seven times higher than that of Los Alamos County.

show that high school students in the predominantly minority areas drop out of high school at a much higher rate than students in White communities. For example, in 1999-2000, Los Alamos, a predominantly White community (75%) had a drop-out rate for White students in the 9th-12th grades of 1.12% but Belen, a school system of comparable size but with a predominantly minority community (73%), had a drop-out rate of 5.3% for Native Americans and 10% for Hispanics.[28] Thus, a principal problem hindering New Mexico from extending legal services to its citizenry is the racial segregation of its communities and the myriad social ills related to it.

Economic disparities, which clearly fall along racial lines in New Mexico, translate directly into barriers in access to legal services for New Mexican minorities. Because one of the core values of the American legal system is providing access to all citizens, including those who cannot afford to pay, the state must address these inequities in order to ensure that its citizenry is properly protected. Further, because there are few attorneys who practice in these impoverished areas, it is the state's obligation to take measures that effectively promote the delivery of services to these populations. *Amici* contend that increasing the number of lawyers from New Mexico's Hispanic, Native American and African American communities is crucial in responding to the state's legal needs, and there is no alternative to taking race into account in student admission in its institutions of higher education in order to train a sufficient number of lawyers from all backgrounds.

B. New Mexico Must Respond To The Need For Specialized Legal Services For Its Indian Tribes And Nations.

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[27] *Supra,* n.23.

[28] For student enrollment data showing ethnicity by district, see http://sde.state.nm.us/div/ais/data/fs/dist/13/02.03.ethnic.pdf (2/13/03) and for data on drop out rates by ethnicity see http://sde.state.nm.us/div/ais/data/fs/dist/29/99.00.dropout.rates.eth.pdf (2/13/03).

The problems of poverty, limited access to medical, legal and other services as well as high drop-out rates afflict, at even higher rates than other racial groups, the Native American members of the state's twenty-two Indian nations (nineteen Pueblos and the Navajo, Mescalero Apache, and Jicarilla Apache). The state's Native Americans live on the pueblos and reservations as well as in the cities and towns. In the poorest state, Native Americans are the poorest citizens. The most recent data available shows 10.2% of Native Americans who are fully employed and 28% of those who have part-time employment fall below the poverty line; seven out of ten have a high school diploma or less, and they are the most likely victims of violent crimes.[29]

Poverty and its problems are not the only reasons why the state of New Mexico must be attentive to the need for a diverse bar. Most of the tribal governmental entities have tribal court systems that include both traditional elders and law-school trained professionals to design and implement culturally sensitive procedural and substantive laws for their peoples.[30] New Mexico, as home to twenty-two separate and distinct Indian governments, must respond to this need for Indian law specialists and widespread understanding among all lawyers about the rights of tribal governments and persons. [31] Recent action taken by the New Mexico Supreme Court and the Board of Bar Examiners to include federal Indian Law on the state bar exam illustrates one such response ensuring that all lawyers are prepared to serve all clients. Thus, because of racial segregation, the attendant problems of poverty and the special needs of tribal governments, New Mexico faces special challenges in providing legal services to all citizens.

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[29] For poverty and education statistics, *see New Mexicans: Who Are We*, http://www.health.state.nm.us/StateofNM2000/newmexicans.htm (2/13/03). For crime data, see U.S. Census, *supra* n. 20.

[30] *See* Christine Zuni Cruz, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 72 (1997).

[31] *Id.*

II. TRAINING SIGNIFICANT NUMBERS OF STUDENTS OF COLOR IN ITS LAW SCHOOL ACHIEVES NEW MEXICO'S COMPELLING STATE INTEREST IN PROVIDING LEGAL SERVICES TO ITS UNDERSERVED CITIZENS.

It is the contention of the *amici* that race-sensitive admissions policies, such as those utilized by the University of New Mexico School of Law and the University of Michigan School of Law, are constitutionally valid.[32] These policies, while designed to further the compelling interest of diversifying higher institutions of education recognized in *Bakke*, are narrowly tailored in that there are no viable alternatives to the use of racial considerations in achieving that end and are not so inflexible as to constitute inherently permanent programs.[33]

Amici take issue with the federal government's view that such policies fail the tenets of this Court's narrow tailoring decisions because there are other "race-neutral alternatives," such as those adopted in Texas, Florida and California, which would achieve diversity by the same measure.[34] While the government is quick to exalt preliminary studies of these state's "percent plans," which guarantee admission to state colleges for a fixed percentage of the top students from every high school in the state, it ignores the most recent and comprehensive studies completed to date, namely those conducted by scholars at Harvard University.[35] In stark contrast to the studies cited by the

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[32] *See Bakke*, 385 U.S. at 311.

[33] *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986) (plurality opinion) (concluding that a school board's preferential protection of racial minorities during lay-offs was not narrowly tailored as it had "no logical stopping point."). *See also* Brief for the Petitioner at 24.

[34] *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 24.

[35] *See* Catherine L. Horn and Stella M. Flores, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences (2003), and Patricia

government, these reports conclude that percent plans alone do not serve as effective alternatives to affirmative action. In fact, research indicates that these plans "have fallen well short of creating diverse flagship campuses reflective of the states they are intended to serve."[36] In the best of circumstances, the plans have only been able to promote racial and ethnic diversity on college campuses when they are coupled with recruitment, outreach, financial aid, and support programs targeted at underrepresented communities with large minority populations - all elements of solid race-conscious affirmative action plans.[37]

Those conclusions are in congruence with the arguments advanced by the drafters of Texas' percent plan in support of Respondent, who assert that not only are these plans limited, as they address only undergraduate admissions, but that is it not possible to use percent plans as a substitute for racial considerations in any admissions, undergraduate or otherwise.[38] *Amici* contend that the decision in *Grutter*[39] should and must be affirmed as it clearly represents the holding of this Court's decision in *Bakke*. *Amici* agree with the Sixth Circuit's pronouncement that, despite recent judicial assertions to the contrary,[40] *Bakke* represents binding precedent of this Court.

Amici assert that "the attainment of a diverse student body. . .[is a] constitutionally permissible goal for an institution of higher education," and urge this Court to reaffirm *Bakke's* recognition that taking race into account as

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Marin and Edgar K. Lee, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida, (2003).

[36] *See* Horn and Flores, at 50-51.

[37] *See Id.*

[38] *See* Brief of Authors of Texas Top Ten Percent Plan as *Amici Curiae* in Support of Respondents. (No. 02-241) (U.S. Sup.Ct.). Respondents and other *amici* writing in support of Respondents will argue that proposition more fully and, in complying with this Court's requirement that arguments not be unnecessarily duplicated, it will not be addressed further in this brief.

[39] *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

[40] *See Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996).

one factor in the evaluation of students for admission to institutions of higher education may serve that compelling state interest.[41]

A. UNM School Of Law's Commitment To Diversity In Admissions Results In Better Access To Legal Services For New Mexico's Underserved Communities.

New Mexico residents seeking a law degree in the state have only one choice, the UNM School of Law. As the state's publicly funded Law School, state residents receive a strong preference.[42] The law school currently enrolls between 105 and 110 students each year and by design, these students are predominantly New Mexico residents, a majority of whom remain in the state and serve local communities. Residential preferences reflect the Law School's obligation to address the unique problems New Mexico faces in rendering legal services to all sectors of the state.

Services provided by UNM minority graduates represent a unique and irreplaceable component of the state's legal landscape. Since 1966, when the Law School began a special scholarship program for Native Americans, race-conscious measures have been taken to insure that equal educational opportunity is not empty rhetoric for the state's under-represented minorities.[43] The implementation of outreach, scholarship, remedial and enrichment programs resulted in a dramatic increase in racial and ethnic diversity. During the years 1968 through 1973, the overall average of

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[41] *Bakke*, 438 U.S. at 311-312.

[42] *See, e.g., Buckwald v. UNM School of Medicine*, 159 F.3d 487 (10th Cir. 1998) (holding residential preferences in admissions are justifiable to supply needed medical care to underserved areas of the state.) *Id* at 498.

[43] *See UNM School of Law Self-Study Report (1978) ("1978 Self-Study Report").* Each accredited law school prepares and submits self-study reports in connection with the re-accreditation visits done every seven years by representatives of the Association of American Law Schools under the auspices of the American Bar Association.

minority students at the Law School was 18%.[44] During the next five years the overall average increased to 36%.[45]

The annual class photographs that hang in this Law School's library and in the corridors of many other law schools also tell a story of slow and steady progress towards meaningful gender and racial integration. Those photos chart local history and record a lesson that was learned in many different locations: namely, how the racial and gender homogeneity of the student body of the 1950's was slowly replaced with racial and gender diversity. The University of New Mexico recognized the problem of dismantling the structures of *de facto* segregation and moved to extend educational access to all of the state's citizens, thereby improving legal services for all. What did the Law School do? It changed the process by which it admitted students. Why did it do so? New Mexico needed to multiply the number of minority professionals in its legal systems.

The mission of the Law School, refined and re-adopted in 1996 by the Law School faculty, defines these objectives:

> As a professional school, the Law School's role is to provide academic and professional instruction to those who wish a legal education... *The ethnic and racial diversity has been deliberately taken into account in student admissions policies,* curricular design and is reflected in the significant number of students, faculty and staff who are functionally bilingual and bicultural... [E]mphasis on serving New Mexico imposes obligation on the school that may be beyond those of other law schools...[O]ur graduates will be expected to play a major role in the development of the legal system of this state. (Emphasis added.)

As it transformed its student body over the decades, the Law School found that race-based considerations in

[44] *Id.* at 57b.
[45] *Id.*

admissions ensure that the legal needs of the state's communities are adequately met. The Law School is the single most important source of attorneys for the state, accounting for almost half of the lawyers in the state.[46] UNM not only provides a significant portion of the Native American attorneys practicing in the state, the school also makes an indispensable contribution to the Hispanic membership of the bar. UNM's commitment to the inclusion and enhancement of both of these groups becomes even more essential in light of the fact that New Mexico is the only state where the Hispanic and Native American communities together constitute a growing majority of the state population.

Given this trend, it becomes essential to ensure that the state's institutions are collaborating to respond to the interconnected needs of this demographic development. From 1990-99, the overall percentage of minority lawyers in New Mexico increased by 4%; the State Bar Task Force on Minorities in the Legal Profession concluded, "the increase is attributable largely to the admission policy of the Law School and the Law School's continuing commitment to diversity in the legal profession."[47] UNM Law School's ability to meet the legal needs of the state's underserved communities is inextricably linked to it admissions process.

The law school's admissions process, which directly impacts the composition of the state bar, cannot produce the requisite number of minority lawyers relying primarily on objective measures. The parties agree that minority law school applicants generally do not perform as well on the Law School Admission Test ("LSAT") as their White counterparts;[48] yet, the majority of law schools have not shown any resolve to replace it with other measures of academic potential. Ironically, William Kidder's research

[46] *See State Bar Report,* at 24
[47] *See State Bar Report,* at 25.
[48] *See generally* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions, 72 N.Y.U. L. REV. 1 (1997).*

has shown that LSAT scores sometimes correlate negatively with social activism - that is, the level at which an attorney engages in legal work that addresses the needs of underrepresented communities.[49]

In fact, the study of the University of Michigan Law School graduates shows a correlation between race and service provided to under-represented communities as well as other civic activities.[50] Specifically, they found that minority lawyers who had entered with lower LSAT scores tended to engage in public service work at a higher rate than their White counterparts with higher LSAT scores, on average.[51] Especially for a state-funded law school, whose duty it is to produce lawyers to serve all constituencies, race-based considerations in admissions must be utilized in order to meet those obligations. This is particularly true in a minority-majority state like New Mexico.

For more than three decades, New Mexico's law school has admitted some students with low numerical predictors (i.e., students with lower LSAT scores than other comparable law schools and sometimes lower undergraduate grade point averages, "UGPA's"). For example, for the 1998-99 entering class, the LSAT scores ranged from 141 to 169[52] and the UGPA's ranged from 2.32 to 3.96.[53] UNM evaluates multiple forms of information about the applicant's potential for academic and

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[49] *See* William Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 56 (2000).

[50] *See* Richard O. Lempert, David L. Chambers & Terry K. Adams, *An Empirical Study of Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOCIAL INQUIRY 395 (2000) ("the U-Michigan Report").

[51] *Id.* at 439-440, 471. *See also* William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER at 165 (1998) (test scores and grades of minority undergraduates at selective colleges did not predict future civic participation.).

[52] Thirty years ago, the Law School occasionally admitted students with much lower LSAT scores (scoring was calculated on an 800 point scale). *See 1978 Self-Study Report* at 57b.

[53] *See State Bar Report*, at 19.

professional success. Then, by providing mentoring and other institutional support programs, the Law School has ensured that almost all of these students graduate, pass the bar and become successful members of the profession. In fact, the eventual bar passage rate for all applicants in New Mexico is greater than 90%.[54]

The Law School's experience is consistent with the results being achieved by the students accepted under the Texas Top Ten Percent Plan (the "Texas TTPP"). Specifically, standardized tests are not precise predictors of who will do well in school nor, *amici* contend, of who will do well in practice. Under the Texas TTPP, undergraduate students from poor and segregated high schools outperformed their White counterparts at every SAT score level.[55] *Amici* assert that many of the Law School's graduates have also outperformed their low standardized test scores when one considers their success as lawyers.

To reiterate, New Mexico's law school designed a program that, over decades, targeted the *de facto* racial segregation that blemished its legal and educational systems and, since then, has sustained a high quality legal educational system that serves its diverse constituencies. Recently, however, progress has slowed[56] and will almost certainly be radically curtailed if universities are prohibited from using the types of race-conscious procedures that have transformed the legal profession in the state of New Mexico.

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[54] *See State Bar Report*, at 34.

[55] *See* Authors of the Texas Top Ten Percent Plan, Brief *Amicus Curiae*, *Grutter v. Bollinger* (No. 02-241) (U.S. Sup.Ct.).

[56] For example, the number of Hispanic lawyers in the New Mexico state bar increased from 400 in 1988 to 840 in 2000. *See* Miguel A. Mendéz and Leo P. Martínez, *Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 BERKELEY LA RAZA L. J. 59, 67 (2002). However, during that same period the ratio of Hispanic lawyers to the Hispanic population fell from 36.8% to 35.7% (that is, the percentage of Hispanic lawyers grew by 1% but Hispanic representation in the population grew by 4%). *Id.* Moreover, the percentage of minority students in the entering class at UNM Law School has fallen from an average of 45.5% during the years 1990-95 to an average of 37.6% for the years 1996-2000. *See UNM Self-Study Report*, (2000).

New Mexico has succeeded in increasing the number of Hispanic, Native American and African American lawyers by designing and implementing an admissions system similar in certain respects to that used by the University of Michigan Law School, at issue in the case at bar. Specifically, all members of the admissions committee read each resident application and no points are allocated to any evaluation criterion.[57] Instead, admissions committee members assign one overall admissibility number based on all the applicant's information.[58] The Law School's admissions committee is attentive to the racial identity of applicants and to the racial composition of the entire class. Whether "myriad factors of human existence" have created a segregated state or not, it is clear that without race-sensitive considerations in admissions, there would be noticeable gaps in our delivery of legal services to entire communities.[59]

B. <u>New Mexico's Law School's Curriculum With Its Emphasis On Clinical Legal Education Is Designed To Prepare Students To Serve The State's Racially Diverse Communities.</u>

UNM Law School's clinical programs are the curricular innovation that provides short and long-term benefits to the state. The Law School has responded to the legal needs of the state not only by admitting a racially diverse group of highly qualified students but also by designing a program of study that prepares lawyers to provide services to a wide range of clients. Because it recognized the need to train lawyers to deliver services to a low-income clientele living in cities, small towns and Indian reservations, UNM's law school became a leader in clinical legal education.[60] Since

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[57] *See UNM Admission Policy* (1996).

[58] *Id.*

[59] *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (Concurrence, J. O'Connor, quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971)).

[60] Professor Antoinette Sedillo Lopez, director of UNM's law clinic, has traced the history of clinical education both nationally and in New Mexico. *See Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307 (2001).

1970, UNM has made participation in its clinical courses a graduation requirement.[61] In doing so, UNM adopted the dual mission of clinics: to provide skills training to students and deliver high quality legal services to underrepresented communities, which means a large number of clients that identify as racial minorities.[62] The New Mexico Supreme Court has permitted students to represent clients and appear in court under faculty supervision.[63]

Recent statistics demonstrate that a significant majority of the clients who are served by UNM's clinical program are low-income racial minorities. Since 1998, minorities have accounted for almost two-thirds of the clients whose background is known.[64] These numbers show that UNM is meeting its objective of providing service to underserved populations of color. It is within this experience that law students begin to understand the intersection of race and law and its relevance to legal practice.

The New Mexico Legislature has also recognized the value of clinical education by annually funding the Southwest Indian Law Clinic ("SILC") since 1994.[65] The purpose of the SILC[66] is to study Tribal law within New Mexico and train practitioners for the emerging tribal court systems in New Mexico and throughout the U.S. During the period from 1994 to May 2001, 96 students, of which approximately half are Native American, successfully completed the program, and 147 individuals and tribes with

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[61] *Id.* at 312.

[62] 7 CLINICAL L. REV. at 310.

[63] *See* N.M. DIST. CT. R.C.P. 1-094 (2001).

[64] Data compiled by the UNM Law School Clinic Programs from computerized intake information.

[65] *See Program Report: Southwest Indian Law Clinic*, (7/1/00-6/30/2001).

[66] *Id.* SILC is a primary component of the Indian Law Certificate program that provides specialized training to law students, regardless of racial background. The UNM Indian law program exists because of the distinct historical and political presence of tribes in the state and because Indian law plays a critical role in this state's jurisdictional relationships.

Indian Law issues were provided with legal representation.[67] Developing collaborative relationships among the Indian pueblos and tribes, the Legislature, and the law faculty has accomplished the objectives of this program to train students in Tribal law so they can return to their communities as fully competent lawyers.[68] UNM's Law School clinics are an example of a long-term collaboration among the state's legal institutions responding to the state's unique cultural, economic and demographic environment. The clinics are a viable educational and service component because the judiciary, the state bar, the legislature and the Law School are committed to training a racially diverse group of lawyers to serve the entire state, especially those citizens who cannot afford legal services. [69] *Amici* contend that successful clinical programs with their distinct pedagogical and service programs, most particularly, a Tribal law clinic, cannot prosper without significant numbers of students of color. Admission policies that fail to consider race as one factor have been shown to disqualify such students from ever preparing themselves as lawyers and rendering services to their communities or to the wider society.

C. Minority Doctors and Lawyers Provide Needed Services To Minority Communities.

In recent years a growing body of scholarship has closely studied the role of minority professionals in serving

[67] *Id.*

[68] *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities,* 5 CLINICAL L. REV. 557 (1999) (examining the challenges of training students to work with tribal communities by focusing on culture and "insider/outsider" status within communities).

[69] *See* Brief of the American Bar Association, *Amicus Curiae* (filed May 31, 2001); *See also Grutter v. Bollinger, et. al.* (No. 01-01447) (6th Cir. 2002) (arguing that "diversity among the bar will make the legal profession more responsive to the needs of all segments of our heterogeneous society.").

underrepresented communities.[70] Significantly, the research establishes that minority doctors and lawyers are substantially more likely to provide services to underserved populations than non-minority professionals.

In 1996, a California study analyzed the relationship between a physician's race and the likelihood s/he would care for poor or Black and Hispanic patients.[71] Notably, the results of the study indicate that "Black physicians practiced in areas where the percentage of [B]lack residents was nearly five times as high, on average, as in areas where other physicians practiced. Hispanic physicians practiced in areas where the percentage of Hispanics residents was twice as high as in areas where other physicians practiced."[72] Black physicians also were found to care for more patients insured by Medicaid, and Hispanic physicians found to care for more uninsured patients than did any other racial group of physicians. The researchers concluded "Black and Hispanic physicians have a unique and important role in caring for poor, Black, and Hispanic patients in California."[73]

Further, when researchers controlled for poverty level, they found the same trend, namely, Black and Hispanic physicians are significantly more likely to provide services to same-race patients *regardless* of income level. Finally, although the study discussed that physicians of any race tended to serve poor, Black and Hispanic patients in greater measure if they located their practices in high minority areas, the researchers concluded "Black and Hispanic physicians consistently care for disproportionately high

[70] An example of an electronic transcript of an international conference on the links between race and medicine and the work being funded and organized by the federal government is titled *Racial and Ethnic Health Disparities,* http://www.astdhpphe.org/elecconf/papers/003papers.htm (2/13/03).

[71] *See* Miriam Komaromy, M.D., *et al., The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations,* 334 N. ENG. J. OF MED.1305 (1996).

[72] *Id.* at 1308.

[73] *Id.*

numbers of these patients" even when serving underrepresented communities in tandem with non-minority doctors.[74] Other studies have found similar results. Minority doctors are more likely to serve same-race patients from underserved communities, regardless of income level.

The same type of research conducted in the legal field shows a similar pattern of service. Minority lawyers have statistically higher rates of both serving minority and poor communities and being socially active than their White counterparts. Several studies, such as Bowen and Bok's seminal research, demonstrate this relationship.[75] Another prominent study of the University of Michigan Law School graduates concluded that minority lawyers are more likely to be socially active than their non-minority counterparts, as measured by work in nonprofit organizations, pro bono services provided to needy clients or participation in mentoring programs for other lawyers.[76] A study from the UCLA School of Law demonstrates that Asian American graduates admitted through the "special" admission program "served nearly double the number of minority clients and over triple the number of clients needing foreign language proficiency when compared to" Asian American graduates admitted through the "regular" admissions process.[77] As with minority physicians, minority lawyers are disproportionately serving poor and underserved communities. Thus, *amici* contend that prohibiting states from using race as one limited criterion in student admissions would adversely affect access to justice for members of minority communities, thus reducing the number of minority lawyers.[78]

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[74] 334 N. Eng. J. of Med. at 1309.

[75] See generally Bowen and Bok (Data "suggest that many of the most advanced black men and women *are* giving back and maintaining ties to their communities." *Id.*).

[76] *Supra*, n.51.

[77] Kidder, 7 ASIAN L. REV. at 52.

[78] *See* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission To The Legal Profession*, 102 COLUM. L. REV. 1696, 1712 (2002).

While data on the nature and extent of services rendered by minority lawyers to minority communities in New Mexico has not been compiled, it is possible to extrapolate from other studies such as the survey done by the Task Force on Minorities in Legal Profession of the New Mexico State Bar and the census data. They show, in a limited manner, what has been discovered in other localities, namely, that White lawyers tend to serve White communities, including poor underserved ones, while minority lawyers tend to serve minority underserved communities.[79] For example, the counties situated on the state's eastern border have White majority populations. These counties also have relatively high poverty index levels.[80] The number of UNM law graduates that practice in these areas are predominantly White; in fact, 81.25% of the lawyers in these communities are White. Conversely, in counties in the Northern part of the state, which are predominantly Hispanic and Native American, 83.7% of the UNM graduates who practice law in these areas are also Hispanic or Native American. The Law School's ability to meet the legal needs of the state's underserved communities is inextricably linked to considering race as one of a number of factors in the admissions process. In New Mexico this consideration cannot be divorced from a goal of diversity. Because diversity in New Mexico's professional communities is critical, the state cannot protect its citizens without adequately providing the types of professional resources that diverse populations require. The Law School's race-sensitive admissions are a necessary measure in meeting this obligation.

Examples of law students admitted under affirmative action policies who are providing service to underserved communities are too numerous to list; considering some examples from our judiciary, however, shows that the phenomenon established by the studies done

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[79] Compilation of Census data with State Bar Report.

[80] *U.S. Census Bureau* (2000).

by Bowen and Bok[81] and the U-Michigan Report[82] is also present in New Mexico.

In 1970, Petra Maes became one of the first two Hispanic women admitted to the Law School. She explains that in the years prior to her arrival, "it was clear that minorities were not being admitted to UNM; [so] they had to go out of state. [UNM Law School's new administration] felt this was improper and really concentrated its effort to open up admissions to Hispanics."[83] After graduation, Ms. Maes borrowed $4,000 from a local bank and opened up a private practice in the South Valley of Albuquerque, a mostly poor and minority community. Later, Petra Maes moved to a legal services office in Northern New Mexico to address the needs of a primarily Native American clientele.

From the beginning, Ms. Maes desired to sit on the bench, explaining, "the judge is the person who can really impact a case and it didn't seem right that no judges were minorities or women considering the people who were in court."[84] Her second attempt to be elected was successful; she spent seventeen years on the district court bench in Northern New Mexico, "The litigants in my courtroom were going to have their day in court...I understood the community, their issues and their needs." After failing to receive an appointment to the New Mexico Supreme Court, Ms. Maes successfully lobbied for a Constitutional Amendment making some of the positions electoral. She ran for a Supreme Court position and in 1998, Petra Maes became the first Hispanic woman to serve in that capacity. Earlier this year, Justice Maes also became the first Hispanic woman to serve as Chief Justice of any state supreme court in the nation. Her career has been the life of a trailblazer for others.

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[81] *Supra*, n.51.

[82] *Supra*, n.50.

[83] The information in this paragraph reflect statements made by the Honorable Petra Maes in a telephone interview conducted on February 12, 2003.

[84] *Id.*

Tommy and Angela Jewell were admitted to UNM School of Law under the affirmative action policy that "actively recruited students of color."[85] In 1976, the Jewells were two of only three African-American students in their class of 102. Early in their careers, both Jewells worked for a small private firm located in a particularly segregated and socio-economically depressed section of Albuquerque. Their clients were "whoever walked in the door from the neighborhood...[I]t was important to give back"[86]

In 1986, Mr. Jewell was appointed to the district court bench, where he now serves as one of three Children's Court judges. That same year, Ms. Jewell began working as a Domestic Violence Pro Bono Attorney, responsible for recruiting attorneys to represent battered women in their divorces. A majority of these women were poor and/or women of color. In 1988, Ms. Jewell became a domestic violence hearing officer in district court, a position she held until 1996 when she was appointed as a judge for the Domestic Violence division of the Second Judicial District of New Mexico. The Honorable Ms. Jewell opines that, "it is important to keep in mind the different cultural experiences of the people, particularly when determining treatments." The Judges Jewell have received civic awards for their contributions to New Mexico's communities.

In 1973, Christine Zuni, following her older sister, became part of the first wave of minority students to integrate Stanford.[87] She describes being "schooled with an ethic of giving back to her Native American community." In 1978, Ms. Zuni participated in a paralegal program established at Antioch University with an explicit social justice curriculum. In 1979, she applied and was accepted to UNM law school under a program directed at minority

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[85] The information in this paragraph reflect statements made by the Honorable Angela B. Jewell in a telephone interview conducted on February 13, 2003.

[86] *Id.*

[87] The information in this paragraph reflect statements made by Professor Christine Zuni-Cruz in a telephone interview conducted on February 12, 2003.

students that allowed qualified students to finish their undergraduate degrees while working on their law degree. She completed her Stanford degree, spent a summer in England and a year later graduated from law school.

For the last twenty years, Christine, now Zuni-Cruz, has worked with tribal courts, as a trial judge, a court administrator and, most recently, as Associate Justice of the Isleta Pueblo Appellate Court. During the last ten years, she has combined her judging with her teaching and scholarship as a law professor at the UNM Law School. This past year she earned tenure and became the first pueblo woman to be tenured in any U.S. law school. As a professor she has created the Southwest Indian Law Clinic, established an on-line Tribal Law Journal and produced groundbreaking scholarship on the efforts of indigenous peoples to claim, define and implement the rights of self-determination and tribal sovereignty. Professor Zuni-Crūz continues to give back to her Native American community and to the state of New Mexico.

Amici's rationale for race-conscious student admissions is not to have only Hispanic lawyers for Hispanic communities or only African American lawyers providing services to African American clients. Mindful of Justice Douglas' warning in the *DeFunis* case,[88] a*mici* do not espouse such a narrowly cabined view of legal practice. Instead, *amici* advocate for the retention and expansion of educational opportunities for qualified students from all parts of the state and representing many different worldviews and perspectives. Professional competence in a state that has multiple Indian jurisdictions and a rapidly changing population base with a significant percentage of Native American citizens requires affirmative responses from the state's legal institutions.[89]

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[88] *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) ("[t]he purpose of the University of Washington cannot be to produce black lawyers for black, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish [but] to produce good lawyers for Americans."). *Id.*

[89] *Amici* acknowledge the importance of cultural competence in the provision of legal services especially where racial differences between

In conclusion, New Mexico has a compelling interest in providing legal services to all its citizenry. For three decades, its legal institutions have cooperated closely in seeking to eliminate the complex legacy of racial discrimination that blighted this and every other state in the union. New Mexico has taken many coordinated actions to extend legal services to communities that lack legal resources. For example, adding federal Indian Law to the state bar exam enhances the competency of new lawyers and recognizes the jurisdictional relationships among the tribal, state, and federal governments within New Mexico's boundaries.

But no action has been more important than the Law School's design and implementation of a race-conscious student admissions process; that is, and has long been, the platform on which many other state programs have been built. The Southwest Indian Law Clinic is a prime example of a joint project of the legislature, the Indian tribes and nations, and the law school collaborating to train students in Tribal law while providing services to the state's twenty-two Indian sovereigns. *Amici* urge the Court to recognize that a racially diverse law school is indispensable to a racially diverse state bar that can serve the legal needs of all citizens. A limited use of race as one criterion among many in the selection of students for the study of law is the only means available to train sufficient numbers of lawyers from the Hispanic, Native American and African American communities of New Mexico.

III. Conclusion

For the reasons stated above, the *amici curiae* organizations, the New Mexico Hispanic Bar Association,

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lawyer and client can confound the analysis and resolution of legal problems. *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); *see also Brief of the Clinical Legal Education Association, Amicus Curiae* (filed April 10, 2002 *Grutter v. Bollinger* (No. 01-1447) (6th Cir. 2002)).

the New Mexico Black Lawyers Association, and the New Mexico Indian Bar Association, respectfully urge this Court to affirm the decision below and permit the states to continue to use race as one limited factor among many in the evaluation of students for study in institutions of higher education.

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